Supreme Court, U.S.
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No. 92-1449

In The

Supreme Court of the United States

October Term, 1992

ROBERT ROOSEVELT PARKER, JR.,

Petitioner,

v.

THE OREGON STATE BOARD OF BAR EXAMINERS,

Respondent.

On Petition For Writ Of Certiorari To The Oregon Supreme Court

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court has jurisdiction to review the Oregon Supreme Court's decision denying Petitioner admission to practice law in Oregon, when only one of Petitioner's constitutional claims was raised in the state court proceedings and, in that instance, the claim was made for the first time in his Petition for Reconsideration of the Oregon Supreme Court's opinion, such that it may not have been truly decided by the state supreme court.

2. Whether the Court should exercise its discretionary authority to review the Oregon Supreme Court's decision denying Petitioner admission to practice law in Oregon, when the Oregon Supreme Court, to the extent it may have considered or decided a federal constitutional question under the Due Process Clause or Equal Protection Clause of the 14th Amendment to the United States Constitution, did not do so in a manner which is in conflict with any decision of another state court of last resort, a U.S. Court of Appeals or the United States Supreme Court.

3. Whether the Court should exercise its discretionary authority to review the Oregon Supreme Court's decision denying Petitioner admission to practice law in Oregon, when the ample evidence of Petitioner's lack of requisite good moral character leads to the conclusion that Petitioner's admission to practice law did not turn on the state court's adherence to the standards and procedures to which Petitioner now objects.

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STATEMENT OF THE CASE

A. Factual History.

Based on the evidence introduced into the record in this proceeding, the Board of Bar Examiners (BBX), essentially the "trial court" in this context, found: that Petitioner applied for admission to the State Bar of Michigan but the District Character and Fitness Committee in that state recommended against admission in 1986, and Petitioner withdrew his appeal of that decision; that, over several years, Petitioner engaged in a pattern of incurring large amounts of debt and then defaulting on these obligations; that, over a period of 12 years, Petitioner made little or no payment on a court-ordered child support obligation resulting in a $13,000 arrearage by 1990; that, while defending himself *pro se* in collection litigation, Petitioner gave sworn testimony that was incomplete and misleading, and admitted to engaging in tactics to delay the proceeding; that, on several occasions, Petitioner made incomplete or misleading statements in applications for credit; that Petitioner impersonated his employer, an Oregon state senator, to provide an employment reference for himself; that Petitioner admitted he stood by while a co-worker impersonated the same state senator on the phone in order to provide an employment reference for the Petitioner; that, despite being questioned by the state senator about an alleged impersonation incident, Petitioner denied that any impersonation took place and then failed to disclose for over three years the impersonation committed by Petitioner's co-worker; and that Petitioner refuses even today to identify the co-worker who committed the admitted impersonation on Petitioner's behalf.

Based on these findings, the BBX determined by a 10-3 vote that there were ample reasons to conclude that Petitioner did not possess the good moral character and general fitness to practice law required in Oregon (ORS 9.220(2)(b)). The BBX therefore rendered its decision recommending to the Oregon Supreme Court that the Petitioner's admissions application be denied. The three BBX members recommending admission deemed it appropriate that such admission, if it were to be granted, be conditional upon established and continued oversight of Petitioner's management of client funds.

B. Procedural History.

Respondent accepts Petitioner's statement of the procedural history of this case with the following additions:

At no time prior to or during the evidentiary hearings before the BBX, over three separate days in May, June and July of 1991, did Petitioner raise any concern or objection of constitutional dimension regarding the allocation of the burden of proof or the quantum of evidence required in Oregon bar admissions proceedings.

Nowhere in his Petition for Review or supporting Brief filed with the Oregon Supreme Court, and at no time during oral argument before that court, did Petitioner raise any constitutional claim regarding the allocation of the burden of proof or the quantum of evidence required in Oregon bar admissions proceedings.

The Oregon Supreme Court opinion denying Petitioner's application for admission was unanimous and

addressed only one of several grounds deemed sufficient by the BBX to warrant denial.

Petitioner then filed with the Oregon Supreme Court a Petition for Reconsideration in which he raised only one of the constitutional issues he now presents – whether the burden of proof allocated to Petitioner comports with the Due Process Clause under the 14th Amendment to the United States Constitution.

The order denying Petitioner's Petition for Reconsideration was silent as to whether the Oregon Supreme Court considered or decided the due process issue belatedly raised by Petitioner.

SUMMARY OF THE ARGUMENT

Petitioner did not timely raise his constitutional claims in the state court proceeding, nor can it be said with any certainty that the Oregon Supreme Court truly decided these federal questions. There is no conflict among jurisdictions or any compelling reason provided by inconsistencies in case law for the Court to review whether Oregon's burden of proof and quantum of evidence required in bar admissions matters are appropriate. Ample evidence in the record supports the Oregon Supreme Court's decision such that Petitioner's application for admission to practice law may very well have been denied regardless of the allocation of the burden of proof.

ARGUMENT

I. Petitioner's Failure to Timely or Properly Raise His Federal Questions Deprives the Court of Jurisdiction Under 28 USC §1257(a).

Although Petitioner presents five separate, federal questions to this Court, his contentions come down to whether the state practices in bar admissions proceedings of placing the burden of proof on the applicant, and of requiring such proof by clear and convincing evidence, were constitutionally defective. This Court has jurisdiction to consider these questions under 28 USC §1257(a) only if Petitioner properly and timely raised them in the state court proceedings. *Cardinale v. Louisiana*, 394 US 437 (1969). He did not do so.

Petitioner raised none of the now asserted constitutional claims before the Board of Bar Examiners (BBX), the "trial court" in Oregon's bar admissions system. Petitioner also failed to raise initially any federal question before the Oregon Supreme Court, either in his Petition for Review and Supporting Brief or during argument. Not until the Oregon Supreme Court denied Petitioner's admission, *In re Parker*, 314 Or 143, ___ P2d ___ (1992), did he file a Petition for Reconsideration with the state supreme court raising for the first time a constitutional issue, and only one – that placing the burden of proof on Petitioner violated the Due Process Clause of the 14th Amendment to the U. S. Constitution.

In Oregon, the general rule is that an issue must be raised and preserved at trial in order for it to be considered on appeal. *Ailes v. Portland Meadows, Inc.*, 312 Or 376,

823 P2d 956 (1991), relying on Oregon Rule of Appellate Procedure (ORAP) 5.45(2) which provides:

> "No matter assigned as error will be considered on appeal unless it was preserved in the lower court and assigned as error in the party's opening brief; provided that the appellate court may consider errors of law apparent on the face of the record."

While this preservation principle is not rigid, Oregon courts have generally ruled that constitutional questions, particularly, will not be considered for the first time on appeal if not at least raised below. *State v. Hitz*, 307 Or 183, 766 P2d 373 (1988); *Cooper v. Eugene School District No. 4J*, 301 Or 358, n. 12, 723 P2d 298 (1986); *Highway Com. v. Helliwell*, 225 Or 588, 591, 358 P2d 719 (1961).

Less clear is whether the unique nature of Bar admissions proceedings render this preservation principle inapplicable. Bar admissions cases are matters of original jurisdiction with the state supreme court, neither civil nor criminal in nature but *sui generis*. Oregon Revised Statute (ORS) 9.529. They are subject to their own method of appellate review. See ORAP 11.25, regarding appellate procedure in Bar admissions, reinstatement and discipline matters. Indeed, *Konigsberg v. State Bar*, 353 US 252, 254-58 (1957), suggests a bar admissions applicant will not be strictly held to procedural requirements regarding issue preservation for appeal.

Distinguishing *Konigsberg* from Petitioner's case, however, is that the applicant in *Konigsberg* asserted his constitutional claims orally at hearing and in writing to the California Supreme Court. Here, Petitioner raised no constitutional claim until after his case was decided by

the Oregon Supreme Court. There was, therefore, no opportunity for the BBX to compile a record with the federal questions in mind or to determine whether its decision would be any different were petitioner's objections to be remedied – important considerations under *Cardinale v. Louisiana*, 394 US 437, 439 (1969). At the appellate level, there was no full airing of the federal claims through competing arguments of adversary parties in briefs and oral argument, deemed critical for appellate review in Oregon. *Ailes v. Portland Meadows, Inc., supra*, 312 Or at 382.

Was Petitioner's failure to raise his constitutional questions before the Board of Bar Examiners or the Supreme Court on review "cured", at least as to the one federal question regarding burden of proof, when Petitioner raised it in his Petition for Reconsideration, which the Oregon Supreme Court denied? The answer may be yes *if* the Oregon Supreme Court actually considered and decided the federal question in the course of denying the reconsideration petition. *Raley v. Ohio*, 360 US 423, 436-437 (1959). However, when the state court is silent as to the basis of its denial, as here, jurisdiction by this Court is debatable and therefore should not be exercised. *Stembridge v. Georgia*, 343 US 541, 547-48 (1952); *Bailey v. Anderson*, 326 US 203, 206-07 (1945). *Cf., Eddings v. Oklahoma*, 455 US 104 (1982), where a federal question raised for the first time in a petition for rehearing was considered timely after the state court permitted arguments on the question and the court's subsequent order of denial stated that the arguments were fully considered. In Oregon, ORAP 9.25(3) precludes any response to a petition for reconsideration except at the express request of the

court. No such arguments were requested or allowed by the Oregon Supreme Court in this case.

Finally, petitioner asserts that some of his federal questions could not have been raised sooner than his Petition for Reconsideration because he could not have anticipated the Oregon Supreme Court to rule the way that it did. *Herndon v. Georgia*, 295 US 441, 443-44 (1934). First, it bears repeating that Petitioner's reconsideration request raised but one constitutional argument, regarding burden of proof. Second, the burden of proof and quantum of evidence in Oregon bar admissions matters were clear and known to Petitioner from the outset. If Petitioner believed there were constitutional objections to these standards, asserting those objections did not need to await the issuance of the Oregon Supreme Court's opinion.

This Court should not entertain the Petition for Writ of Certiorari based on contentions that were not timely and properly raised, but clearly were afterthoughts following the decision of the Oregon Supreme Court denying Petitioner's application for admission to practice law.

II. There Is No Conflict Among States, Circuits, Or With This Court Over The Constitutional Propriety Of Admissions Standards Similar To Those In Oregon.

This Court has long held that states are free to establish standards by which applicants for admission to practice law are measured, provided that any such qualification has a rational connection with an applicant's fitness or capacity to practice. *Schware v. Board of Bar*

Examiners, 353 US 232 (1957). Oregon follows the *Schware* directive in Oregon Revised Statute (ORS) 9.220(2), which provides:

> 9.220 General requirements for admission. An applicant for admission as attorney must apply to the Supreme Court and show that the applicant:
>
> * * *
>
> (2) (a) Is a person of good moral character and fit to practice law.
>
> (b) For purposes of this section and ORS 9.025, 9.070, 9.110, 9.130, 9.210, 9.250, 9.527 and 9.545, the lack of "good moral character" may be established by reference to acts or conduct that reflect moral turpitude or to acts or conduct which would cause a reasonable person to have substantial doubts about the individual's honesty, fairness and respect for the rights of others and for the laws of the state and the nation. The conduct or acts in question should be rationally connected to the applicant's fitness to practice law.

Like many other states, Oregon places the burden of proving good moral character and fitness on the applicant. Rule for Admission 12.10(6); *In re Rowell*, 305 Or 584, 754 P2d 905 (1988).

Petitioner has pointed to no decision of this Court, any federal circuit or any state court of last resort, and Respondent has found none, which holds in a bar admissions context that placing the burden of proof on an applicant or requiring proof by clear and convincing evidence violates due process of law. To the contrary, existing case law rejects such a contention.

In *Konigsberg v. State Bar*, 353 US 252 (1957), this Court reversed a California state court decision denying a bar applicant's admission to practice law, for lack of evidence in the record rationally justifying the denial. In a dissent from the majority opinion regarding the sufficiency of the evidence, Justice Harlan stated that the Court did not "find wanting in any respect" California's good moral character requirement or the state rule of practice placing the burden of proof on the applicant, noting that 46 of 48 states then did so. *Id.* at 278. Four years later, this time writing for the majority in the sequel *Konigsberg v. State Bar*, 366 US 36 (1961), Justice Harlan again referred to the many jurisdictions in which an applicant for admission to the bar bears the burden of proving good moral character, "a requirement whose validity is not, nor could well be, drawn in question here." 366 US at 40-41.

At the circuit level, there is *Martin-Trigona v. Underwood*, 529 F2d 33 (7th Cir. 1975). There, a challenge on due process grounds to Illinois' admissions process generally and to the allocation of the burden of proof to the applicant specifically, was rejected with reference to *Konigsberg II*.

Much is made by Petitioner of *Speiser v. Randall*, 357 US 513 (1958), a case not involving bar admissions but the propriety of a state provision conferring tax exempt status only to those who carry out the burden of proving they do not advocate the overthrow of the government. This Court struck the state provision, finding that placing the burden of proving non-advocacy of government overthrow on the taxpayer was violative of due process considerations.

Speiser is no reason for this Court to grant certiorari in Petitioner's case. The holding in *Speiser* was expressly limited to those state provisions which are curbs on the constitutional right to speak and, with this limitation, the holding is not necessarily or automatically applicable to the bar admissions context. This was made abundantly clear in the second *Konigsberg v. State Bar*, 366 US 36 (1961), in which this Court emphasized the distinction in *Speiser* between statutes the intent of which is to penalize the expression of political beliefs, on the one hand, and statutes the intent of which is merely to regulate access to positions where unfitness may lead to abuse detrimental to the public interest, like membership to the bar. For the former category of statutes, *Speiser* requires that the state must bear the burden of proving justification for inhibiting speech. No such requirement exists for the latter category. Compare *Law Students Research Council v. Wadmond*, 401 US 154 (1971), in which this Court upheld New York's character and fitness requirement but questioned, without deciding, whether placing the burden of proof on a bar applicant in the form of a loyalty oath likely to inhibit speech was permitted under the Due Process Clause of the 14th Amendment.

No inhibition of free speech is implicated in Petitioner's case or in the Oregon system regulating bar admission by placing the burden of proving good moral character on the applicant. Neither *Speiser v. Randall, supra*, nor any other decision of this Court, of federal circuits or of state courts of last resort, has determined that such a regulatory scheme is constitutionally defective.

III. Ample Evidence In The Record Established Petitioner's Lack of Good Moral Character Regardless Of Where The Burden Of Proof Was Placed.

Petitioner urges this Court to review the legal standards involving the burden of proof and quantum of evidence required in Oregon bar admissions matters. Ultimately, however, the evaluation of an applicant who wishes to be admitted to practice law is very fact-specific, determined by the evidence of the applicant's good moral character and fitness. Oregon Revised Statute (ORS) 9.220(2).

When evidence is in dispute or credibility of witnesses is in question, allocation of the burden of proof and the quantum of evidence required may, in a given case, affect the moral character and fitness evaluation. In this case, however, there was ample evidence, much of it undisputed, supporting a conclusion adverse to Petitioner regardless of who had the burden of proof and regardless of the quantum of evidence required. This is further reason why Petitioner's claims are not appropriate candidates for review by this Court.

Petitioner suggests that the Oregon Supreme Court denied his admission "without any evidence in its opinion" to support such a result, citing *Thompson v. Louisville*, 362 US 199 (1960). Petition for Writ at 26. This assertion is not correct, but even if it were, it is the *record* of the proceeding which must be examined for evidence, not merely the language of the state supreme court opinion. In this regard, it is important to note that the state supreme court expressly chose to discuss but one of several grounds deemed sufficient by the Board of Bar

Examiners to deny Petitioner's application. *In re Parker*, 314 Or 143, n. 2, ___ P2d ___ (1992).

Petitioner's "no evidence" assertion calls for a brief review of the record. Aside from the issue of impersonating a state senator upon which the state supreme court focused, and referencing only evidence undisputed or admitted by Petitioner, the record before the BBX established: that Petitioner's application for admission in Michigan was recommended for denial in part because Petitioner failed to appear in court or pay traffic tickets resulting in at least one bench warrant being issued against him; that Petitioner incurred large amounts of debt, defaulted on many of his obligations and failed to satisfy judgments obtained against him; that Petitioner paid little or nothing over 12 years on a modest $100 per month court-ordered child support obligation; that Petitioner submitted applications for credit which contained incomplete information regarding his outstanding debts and length of employment; and that Petitioner engaged in delaying tactics in litigation in which he appeared *pro se*.

The state supreme court saw no need to discuss these many findings adverse to Petitioner but instead focused its attention on two episodes of alleged impersonation of Petitioner's employer, then State Senator James Hill. Evidence regarding one such episode was in dispute. The other episode, however, was established by admissions from Petitioner and uncontroverted testimony from Senator Hill, quoted in the Supreme Court opinion and set forth at pages 43a-47a of the Petition for Writ. This testimony established: that Petitioner witnessed another individual impersonating Senator Hill on Petitioner's behalf during a phone call; that, when asked, Petitioner denied

to Senator Hill and others that any impersonation took place; and that Petitioner did not disclose this undisputed impersonation for over three years thereafter.

Clearly, there was "evidence" in the *Thompson v. Louisville* sense supporting the BBX and state supreme court's rejection of Petitioner's admissions application. It is also reasonable to conclude that, based on this uncontroverted evidence "which would cause a reasonable person to have substantial doubts about [Petitioner's] honesty, fairness and respect for the rights of others and the laws of the state and the nation", ORS 9.220(2)(b), Petitioner's admission to practice law did not turn on who had the burden of proof or the quantum of evidence required. Had Petitioner timely raised his now asserted constitutional claims, the Oregon Supreme Court may very well have said so, as it did in another contested admissions case where similar challenges were raised. See *In re Fine*, 303 Or 314, n. 1, 736 P2d 183 (1987).

CONCLUSION

Bar admissions standards should not be arbitrary barriers to those qualified to practice law, but they must be an effective method of protecting the public from individuals lacking the character and fitness required of lawyers. Petitioner has provided no reason under the Federal Constitution for this Court to question Oregon's admissions standards as applied in Petitioner's case.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted

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May 1993

OREGON REVISED STATUTE 9.529 Status of proceedings relating to discipline; admission or reinstatement. Bar proceedings relating to discipline, admission and reinstatement are neither civil nor criminal in nature. They are sui generis and within the inherent power of the Supreme Court to control. The grounds for denying any applicant admission or reinstatement or for the discipline of attorneys set forth in this chapter are not intended to limit or alter the inherent power of the Supreme Court to deny any applicant admission or reinstatement to the bar or to discipline a member of the bar.

ORAP 9.25 RECONSIDERATION IN SUPREME COURT

(1) A party seeking reconsideration of a decision of the Supreme Court shall file a petition for reconsideration within 21 days from the date of the decision. The petition shall be in the form of a brief, prepared in conformity with Rule 5.05, insofar as it is applicable. The petition shall include a copy of the court's decision. A petitioner shall identify on the cover which party is the petitioner, the date of the decision, and, if there is an opinion or if there are opinions, the judges who joined therein.

(2) The petitioner shall file the original and 12 copies of the petition with the Administrator. The original shall show proof of service of 2 copies on every other party to the appeal or review.

(3) No other party shall respond unless the court so requests.

(4) The court shall either deny or allow reconsideration. If the court allows reconsideration, the court may

reconsider with or without further briefing or oral argument. Reconsideration shall result in affirmance, modification or reversal of the decision that has been reconsidered.

ORAP 11.25 BAR ADMISSION, REINSTATEMENT AND DISCIPLINARY PROCEEDINGS.

(1) As used in this rule, the following are parties:

(a) The Oregon State Bar in a disciplinary, contested admission or contested reinstatement proceeding.

(b) The accused in a disciplinary proceeding.

(c) The applicant in a contested admission proceeding.

(d) The applicant in a contested reinstatement proceeding.

(2)(a) A petition concerning a disciplinary proceeding, a bar applicant's contested admission or a former member's contested reinstatement shall be filed with the Administrator, together with an opening brief, with proof of service on all parties, within 28 days after written notice to the Bar's Disciplinary Counsel and the parties of the court's receipt of the decision of the trial panel under Oregon State Bar Rule of Procedure 10.5(a). An answering brief shall be due 28 days after filing of the opening brief. A reply brief, if any, shall be due 14 days after filing of the answering brief.

(b) A brief in any of the proceedings named in this rule shall conform to Rule 5.05, 5.10 and 5.35, except that no abstract of record is required, and shall show proof of

service on all parties to that proceeding. The Bar shall be served by service on the Bar's Disciplinary Counsel.

(3) If, notwithstanding Bar Rule of Procedure 10.5(b), an accused who is required to file a petition and brief fails to do so within the time allowed under Bar Rule of Procedure 10.5(a), the Bar shall:

(a) File a petition and brief within the time allowed for filing an answering brief. The brief shall comply with the rules governing petitions and opening briefs. At the time the petition and brief are filed, the Bar shall indicate whether it wishes to waive oral argument and submit the case on the record, or

(b) Submit a letter stating that it wishes the matter submitted to the court on the record without briefing or oral argument. Notwithstanding waiver of briefing and oral argument under this subsection, at the direction of the Supreme Court, the Bar shall file a petition and brief within the time directed by the court.

(4) If the case is argued orally, the party who files the opening brief shall argue first.

OREGON RULE FOR ADMISSION 12.10 The proceeding.

* * *

(6) *Burden of Proof.* To be entitled to admission to the practice of law in Oregon, an Applicant must establish by clear and convincing evidence that she or he has the requisite character and fitness to practice law.